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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. —

UNITED STATES, PETITIONER

v.

U.S. THERMO CONTROL CO. AND THERMO KING CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the decision of the Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (Appendix A, *infra*, pp. 17–25) is reported at 372 F. 2d 964.

JURISDICTION

The decision of the Court of Claims was entered on February 17, 1967 (App. A, *infra*, p. 17). On May 17, 1967, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 17, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Section 4061 of the Internal Revenue Code of 1954 imposes an excise tax on the sale of truck parts and accessories, and the Treasury Regulations, which this Court has upheld, have long defined these products as including any article which is primarily adapted for use in connection with a truck. The question presented is whether the Court of Claims erred in holding that truck refrigeration units which this definition in terms covers are exempted from the tax by implication.

STATUTE AND REGULATIONS INVOLVED

Section 4061 of the Internal Revenue Code of 1954 and Section 40.4061(b)–2 of the Treasury Regulations (1954 Code), are printed in Appendix B, *infra*, pp. 26–28.

STATEMENT

Respondent[1] manufactures refrigeration equipment specifically designed for installation in trucks and truck trailers used for the transportation of frozen foods and other perishables. During the three-year period here in question (1959–1962) respondent sold truck refrigerator units through 200 dealers throughout the United States, collecting and remitting to the government more than $2,500,000 in automotive excise taxes thereon. *Thermo King Corp.* v. *United States*, 354 F. 2d 242, 245 (Ct. Cl.). Respondent then sued for a refund of this tax. In a prior decision rendered in December 1965, relating to seven

[1] Thermo King is the successor to U.S. Thermo Control and, therefore, they will be referred to in the singular.

1961–1962 sales involving $1,500 in tax (Pltf. Ex., p. 12), the Court of Claims (one judge dissenting) granted summary judgment for respondent, relying heavily on its conclusion that "At no time during the period 1932 up to 1945, did the Bureau of Internal Revenue ever assert that truck or trailer refrigeration units were subject to the tax on automotive parts and accessories." 354 F. 2d 242, 246. On petition for rehearing the government presented evidence that, contrary to the court's finding, the Internal Revenue Service had, since 1932, consistently collected the automotive tax on truck refrigeration units (App. A, *infra,* pp. 19–20; Pltf. Exs., pp. 57–90). Rehearing was denied without opinion, and, because of the unsatisfactory state of the record, the government did not seek review in this Court.

In the instant case, involving more than $2,500,000, which was brought while the first suit was pending, the government made a complete record, introducing (1) an affidavit from the chief of the excise tax branch stating (United States Cross Motion for Summary Judgment, p. 5) that "the rulings of the Revenue Service from 1932 to date have consistently * * * held that truck and trailer refrigeration units or equipment, primarily designed for that purpose, are taxable as automobile and truck parts or accessories" and (2) a series of ruling letters issued between 1932 and 1955 so holding (Pltf. Exs., pp. 57–90). Although the court recognized that its conclusion in the earlier case as to the Service's practice "is no longer correct" (App. A, *infra,* p. 20), it

nevertheless granted summary judgment for respondent (two judges dissenting), again holding that Congress did not intend the tax on truck parts and accessories to cover truck refrigeration units.

REASONS FOR GRANTING THE WRIT

This case presents a significant question in the administration of the federal excise tax—whether truck refrigeration equipment has been exempted from the tax on truck "parts or accessories"—and the affirmative answer of the Court of Claims will involve more than $50 million in taxes. Since all members of the industry affected may sue in that court, there is no likelihood that a conflict of decisions on the point will develop.

From 1919 to the present (except for a four-year period from 1928 to 1932), Congress has imposed an excise tax on the sale of trucks, "including * * * parts or accessories therefor sold on or in connection therewith" (now at a 10 percent rate), and a tax on the sale of truck "parts or accessories" sold separately (now at an 8 percent rate).[2] More than 35 years ago this Court, in *Universal Battery Co.* v. *United States*, 281 U.S. 580, 584, unanimously upheld Treasury Regulations which interpreted the substantially identical language of the Revenue Acts of 1918 and 1921[3] to mean that "articles primarily adapted for use in motor vehicles are to be regarded as parts

[2] See 1954 Code, Section 4061 (App. B, *infra*, p. 26); Revenue Act of 1918, Section 900, c. 18, 40 Stat. 1122.

[3] Section 900, c. 18, 40 Stat. 1122; Section 900, c. 136, 42 Stat. 291.

or accessories of such vehicles * * *."[4] There can be no question—and, indeed, respondent has never denied—that respondent's truck refrigeration units constitute "parts or accessories" under this settled broad interpretation of the statutory language.

The Court of Claims held, however, that by implication in 1932 or 1942 a single product—truck refrigeration units—had been exempted from the excise tax on automotive parts and accessories, and that, although the tax had been collected on such units from 1932 to date without contest by anyone, the implied exemption had been carried forward into the Internal Revenue Code of 1954. But exemptions from statutory coverage by implication are not favored (see below, p. 13), and we submit that such an exemption cannot be found unless it is shown that Congress explicitly and knowingly provided it. As we demonstrate below, no such showing has been made. On the contrary, the available evidence on the point indicates that Congress intended the general tax to cover *all* automotive parts and accessories except for those it specifically excepted—and it did not except truck refrigeration units.

The Court of Claims' holding, if allowed to stand, will result in the loss to the government for a 10-year period of more than $50 million in excise taxes on truck refrigeration equipment.[5] Moreover, the court's

[4] The present regulations are somewhat broader but the differences are not relevant for the purposes of this case. See Treasury Regulations (1954 Code), Section 40.4061(b)-2 (App. B, *infra*, p. 27).

[5] The Treasury estimates that this case will govern the collection of at least $50 million in tax on truck refrigeration

approach in finding an implied excise tax exemption for an article that falls squarely within the language of the taxing structure is likely to lead to extensive litigation with regard to the scope and interpretation of other excise taxes. In the circumstances, review by this Court is plainly warranted.

In reaching its decision the Court of Claims relied on three principal lines of reasoning, each of which is erroneous:

1. The Revenue Act of 1932 imposed a 2 percent tax on the sale of truck parts and accessories (Revenue Act of 1932, § 606, 47 Stat. 261–262) and a 5 percent tax on the sale of "[h]ousehold type refriger-

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units during the period 1963 to 1972. In 1972 the tax on trucks and truck parts and accessories will drop from their present levels of 10 and 8 percent, respectively, to 5 percent, Section 4061 (a) and (b) (App. B, *infra*, pp. 26–27); thus, even after 1972 tax collections on truck refrigeration units will exceed $2.5 million per year.

The $50 million figure includes both the 10 percent tax on truck refrigeration units sold on or with a truck and the 8 percent tax on such equipment sold separately for installation on an existing truck. Although the instant decision deals only with the latter tax, the principle on which it rests—that Congress has impliedly exempted truck refrigeration units from the tax on truck parts and accessories—applies equally to both taxes, and the Service therefore intends to treat them the same. Section 4061(a) taxes trucks "including * * * parts or accessories therefor sold on or in connection therewith" at 10 percent and Section 4061(b) taxes "parts or accessories * * * for" trucks at 8 percent. In the *Universal Battery* case this Court commented that "the words 'parts' and 'accessories' have the same meaning in" both subsections (281 U.S. at 582). Thus the instant decision will prevent the government from collecting any excise tax on truck refrigeration equipment, whether sold along with a truck or separately.

ators" (Revenue Act of 1932, § 608). Without citing any legislative history or other specific evidence of legislative intent, the Court of Claims ruled that Congress' enactment of the 5 percent tax on household type refrigerators in itself demonstrated an intent to exempt all commercial refrigeration equipment from any tax, and it stated that if Congress had intended to tax refrigeration equipment designed and adapted for use on trucks, "it is reasonable to conclude that such a change of intent would have been clearly expressed in that part of the [1932] Act covering auto parts and accessories" (App. A, *infra*, p. 22). These conclusions are without support and are erroneous.

The legislative history of the Revenue Act of 1932 contains absolutely no indication that Congress, by imposing a 5 percent tax on household type refrigerators, intended completely to exempt all other refrigeration equipment from all tax. In fact the legislative history sheds no light on why the 5 percent tax was limited to "[h]ousehold type refrigerators"—although one can speculate that Congress may have wished, by this section, to impose a higher special tax on what was then perhaps viewed as a luxury item. Nor does the legislative history indicate that Congress at any time considered the applicability of the 2 percent automotive parts and accessories tax to truck refrigeration equipment, which was apparently at an early stage of development at that time.[6] The Regulations which had been in force from 1919 until Congress repealed the automotive tax in 1928[7] clearly

[6] See Pltf. Exs., pp. 4–6, 19, 24.

[7] Treasury Regulations 47 (Revenue Acts of 1918, 1921, 1924), Articles 15 and 16.

taxed any article which was designed and primarily adapted for installation on a truck, and this Court had upheld these Regulations in *Universal Battery* only two years before, *i.e.*, in 1930.

Thus, when Congress reinstated the automotive tax in 1932, using language identical to the pre-1928 tax and expressing no intention to change the meaning of parts or accessories, it is logical to assume that refrigeration units specifically designed and adapted for installation on trucks, like any other article designed and adapted for such use, were covered.

2. The Court of Claims also relied heavily on a ruling of the Internal Revenue Service published in October, 1932, which read as follows (S.T. 523, XI–2 Cum. Bull. 477 (1932)):

> Advice is requested relative to the application of section 608 of the Revenue Act of 1932 [the household refrigerator tax] to household type of refrigerators and refrigerator components.
>
> Refrigerator parts or units, designed primarily and solely used for commercial purposes, are exempt from tax. These include ice cream cabinets, ice cream cabinet units, water coolers, lens chillers, and refrigerating units for commercial transportation equipment. * * *

The court interpreted this ruling as holding that all commercial refrigeration units were exempt from all excise taxes and implied that Congress, by later reenactments of the Code, had accepted this position (App. A, *infra*, p. 21).

As the published ruling itself makes clear, it was rendered in answer to a specific request "relative to

the application of section 608 of the Revenue Act of 1932," which was the 5 percent tax on household type refrigerators. The ruling did not purport to deal with the applicability of Section 606 of the 1932 Revenue Act (the 2 percent automotive tax) to the relatively few refrigeration units or equipment which were then being designed and adopted for use on trucks. Thus, the ruling held only that commercial refrigerators were exempt from the tax imposed by Section 608,[8] not that they were exempt from all excise taxes.

Less than three months later (*i.e.*, on December 30, 1932), when the Service was specifically asked about the applicability of the automotive tax to truck refrigeration equipment, it replied "that a refrigerator which is designed and primarily adapted for use in an automobile truck is taxable as an automobile accessory" (Pltf. Exs., p. 60). Between 1932 and the present the Service has consistently ruled that truck refrigeration units are covered by the automotive tax.[9]

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[8] As Judge Davis stated in his dissent in the earlier case (354 F. 2d at 252):

"This ruling answered an inquiry as to the incidence of the household-refrigerator tax—nothing else—and the statement that *commercial* refrigerators 'are exempt from tax' meant only that such machines were exempt from the particular tax (*i.e.*, the household refrigerator duty) about which questions had been raised. There is no intimation that the Service was announcing, though not asked to do so, that no excise tax of any nature applied, or could apply, to the enumerated articles."

The commercial transportation equipment referred to in the ruling did not necessarily refer to equipment primarily designed for trucks, since refrigeration units were then also being made for trains and ships. (See Pltf. Exs., pp. 4–6, 19–24).

[9] United States Cross Motion for Summary Judgment, pp. 3–7; Pltf. Exs., pp. 57–90.

As Judge Davis commented in his dissenting opinion (App. A, *infra*, p. 24);

> [I]t is now absolutely clear, to me, that the Internal Revenue Service has always treated these automotive refrigerators as within the "parts and accessories" tax. This is shown by the 18 or so private rulings (stretching from 1932 to the 1950's) now properly before us, as well as by the affidavit of the Chief of the Excise Tax Branch * * *. The 1932 Ruling S.T. 523, pertaining solely to the household refrigeration tax, is quite irrelevant. * * *[10]

Moreover, there is no indication that Congress, in reenacting the Code, either misread the 1932 published ruling dealing with the scope of the refrigerator (not the automotive) tax, or, indeed, even knew that the ruling existed.[11]

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[10] As Judge Davis also noted in his dissent, the few rulings in which the Service concluded that particular refrigeration equipment was not subject to the automotive tax turn on the fact that the Service found that the equipment was not primarily designed for use on trucks (United States Cross Motion for Summary Judgment, pp. 6–7; Pltf. Exs., pp. 85–89). Thus, contrary to the majority's statement (App. A, *infra*, p. 20), those rulings are not inconsistent with the Service's uniform interpretation of the automotive tax.

[11] Even if the ruling could reasonably be read to mean what the Court of Claims said it meant, there is no justification for imputing to Congress approval of such a construction of the law when (a) the ruling was neither formally approved nor promulgated as a regulation by the Secretary of the Treasury, (b) the claimed construction has been repeatedly and consistently rejected by the Internal Revenue Service, and (c) there is no evidence that the ruling was ever brought to the attention of Congress—a not surprising fact since the industry had been collecting the tax from its customers without contest for at least 20 years. Cf. *United States* v. *Calamaro*, 354 U.S. 351, 359; *Sims* v. *United States*, 252 F. 2d 434, 437–439 (C.A. 4), affirmed, 359 U.S. 108; *Haynes* v. *United States*, 353 U.S. 81, 85; *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, 48–50.

3. Finally, the court below placed heavy emphasis on a 1941–1942 legislative development. In 1941 Congress broadened the scope of the household refrigerator tax to cover commercial refrigerators and raised the rate from 5 to 10 percent. At the same time Congress raised the tax on automotive parts and accessories from 2 to 5 percent.[12] Then in 1942 Congress again limited the refrigerator tax to those of the household type. Based upon these 1941–1942 changes in the refrigerator tax and without any legislative history to support its view, the Court of Claims concluded "that the 1942 repeal of the 1941 tax on Commercial Refrigeration" demonstrated that Congress meant to exempt all commercial refrigeration units from any tax, and the court promulgated the following general rule (App. A, *infra*, pp. 23–24):

> [Where] an article [is] subject to tax under a specifically applicable provision, *viz*, [the 1941–1942 tax on commercial] refrigerators or refrigerator units, where there was at the same time a more general provision argued as applicable [the tax on truck parts and accessories], and the provision to which the article was specifically subject is repealed, the article does not become taxable under the more general provision *in the absence of an explicit statement of Congressional purpose that it be so taxable.* [Emphasis in original.]

During the period 1941–1942, when both the 10 percent refrigerator tax and the 5 percent automotive parts and accessories tax were in effect, the

[12] Revenue Act of 1941, Sections 544 and 546, c. 412, 55 Stat. 687, 711, 713.

Service studied the question of which tax should be imposed on truck refrigeration units. It concluded that Congress intended only the 5 percent automotive tax to apply and it so ruled on at least five separate occasions (Pltf. Exs., pp. 67–71).[13] Thus, the 1942 repeal of the 10 percent tax on commercial refrigerators had no effect on the tax status of truck refrigeration equipment.[14]

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[13] Automobiles and trucks frequently contain numerous items—such as radios, clocks, tires, light bulbs, refrigeration equipment, etc.—which might be taxed either under special taxes on such items or under the automotive tax. It would be difficult to compute the excise taxes due on the sale of a car or truck if numerous items had to be separately valued and taxed at various rates. Therefore, Congress has traditionally made an explicit statement in the statute when it wished an automotive part or accessory (such as radios and tires) to be taxed separately under a special tax. See, *e.g.*, 1939 Code, Sections 3403 (c) and (e), 3442 (last sentence), 3443(a)(1)(A); 1954 Code, Sections 4061(b), 4220, 6416 (b)(3) and (c). For example, in the Revenue Act of 1941 itself Congress specifically provided for taxation of automobile radios at the higher rate applicable to radios, and exempted automobile radios—whether sold along with an automobile or separately—from the lower tax on automotive parts and accessories. Internal Revenue Code of 1939, Section 3404, as amended by Section 545 of the Revenue Act of 1941, c. 412, 55 Stat. 687; Sections 3403 (c) and (e), 3442, 3443(a)(1)(A), and 3444(a)(1) and (2) of the 1939 Code, as amended by Sections 544 and 553 of the Revenue Act of 1941, *supra*.

[14] The lower court commented that during 1941–1942 respondent paid tax at the 10 percent rate and the Service has not offered to refund the difference between the 5 percent tax the Service claims was applicable and the 10 percent tax respondent actually paid (App. *infra*, p. 19). However, the Code clearly prohibited respondent from obtaining a refund of excise taxes which it has collected from its customers unless it obtained a waiver from them or agreed to refund to them any recovery (Internal Revenue Code of 1939, Sec. 3443(d);

Moreover, even if during 1941–1942 the Service should have been collecting the 10 percent refrigerator tax rather than the 5 percent automotive tax, repeal of the higher tax in 1942 would (as the dissenting opinion in the first case recognized) cause truck refrigeration units "again [to] bec[o]me taxable at the lower rate of the parts-and-accessories tax"; certainly repeal of the one-year tax on commercial refrigerators had not "carved out, *for all time,* these machines from the automotive tax" (354 F. 2d at 251; emphasis in original).[15] Thus, the lower court's holding that "the 1942 repeal of the 1941 tax on Commercial Refrigeration ended [respondent's] tax liability" (App. A, *infra,* p. 24) violates the oft recognized principle of construction that repeal by implication is not favored absent an unavoidable repugnancy between two statutes. See *Graham & Foster* v. *Goodcell,* 282 U.S. 409, 424–426; *United States* v. *Borden Co.,* 308 U.S. 188, 198; *United States* v. *Zacks,* 375 U.S. 59, 67–68.[16]

United States v. *Jefferson Electric Co.,* 291 U.S. 386). Respondent has never complied with these statutory prerequisites (Pltf. Exs., pp. 48–49).

[15] Judge Davis also said (*supra,* at 253):

"The refrigeration tax was the higher (10%, rather than 5%) and doubtless Congress would desire it to be the one collected. To the extent of the overlap, the automotive tax, at 5%, would therefore remain in abeyance—suspended, quiescent. When the overlay disappeared with the abandonment of the refrigeration tax in 1942, the lesser tax would revive and become effective once more. * * *"

[16] See also *Silver* v. *New York Stock Exchange,* 373 U.S. 341, 357; *Mercantile Nat. Bank* v. *Langdeau,* 371 U.S. 555; *U.S. Alkali Assn.* v. *United States,* 325 U.S. 196, 206; *Penn Dairies* v. *Milk Control Comm'n,* 318 U.S. 261, 275.

The two cases upon which the Court of Claims relied are

In sum, neither Congress' imputed knowledge and approval of a 1932 ruling (which on its face did not provide any broad exemption from all excise taxes and which the Service did not view as doing so), nor the enactment and repeal in 1941–1942 of the short-lived tax on commercial refrigerators, provides any basis for concluding that when Congress enacted the 1954 Code, it intended to create or continue an implied exemption from the broad general terms of the automotive excise tax for the single item of truck refrigeration equipment. If anything should be imputed to Congress, it would be adoption and approval of the long standing Treasury Regulation, which this Court upheld in 1930, interpreting the identical statutory language as covering all automotive parts and accessories.[17]

Certainly, if Congress had been persuaded in 1932

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inapposite. In *United States* v. *Leslie Salt Co.*, 350 U.S. 383, there had long been a documentary stamp tax on "bonds, debentures, or certificates of indebtedness" and another tax at a lower rate on "promissory notes." The Treasury Regulations had, over a long period of years, consistently interpreted the phrase "certificates of indebtedness" as including only those that were akin to "bonds" and "debentures," not mere promissory notes which were subject to the lower tax. The Court found clear evidence that Congress had also understood the two taxes as mutually exclusive, and held that repeal of the lower tax on promissory notes did not subject such instruments to the higher tax on bonds, debentures and certificates of indebtedness. In *J. P. Seeburg Piano Co.* v. *United States*, 62 Ct. Cl. 281, the Court held only that a tax on "automatic slot-device vending machines" did not extend to coin-operated pianos. But see *Remington-Rand, Inc.* v. *Gage*, 4 F. Supp. 199, 200 (W.D.N.Y.).

[17] Cf. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *Fribourg Navigation Co.* v. *Commissioners*, 383 U.S. 272, 283.

or 1942 to exempt truck refrigeration equipment from the truck excise tax, the members of the affected industry could hardly have been unaware of it until 1963 when Thermo King first brought suit. But in the 24 years since 1942 the automotive tax has received the specific attention of Congress by amendment on more than 15 different occasions without evidence of any complaint by anyone as to the taxing of truck refrigeration equipment and without the slightest hint of Congressional disapproval of the Treasury Regulations which cover such equipment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 1967.